Opinion issued April 5, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00746-CV

VICTOR S. HUNG, Appellant

V.

FABIOLA DAVIS, INDIVIDUALLY AND AS NEXT FRIEND OF KEITH HERNANDEZ AND ABIGAIL HERNANDEZ, Appellees

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On Appeal from the County Civil Court at Law No. 2
Harris County, Texas
Trial Court Case No. 1153451

MEMORANDUM OPINION

Victor S. Hung appeals the trial court's interlocutory order denying his Rule 91a motion to dismiss appellee Fabiola Davis's negligence claim against him. In a single issue, Hung contends the trial court was required to dismiss Davis's

negligence claim under the election-of-remedies provision in the Texas Tort Claims Act ("TTCA" or the "Act").[1] *See* TEX. CIV. PRAC. & REM. CODE § 101.106.

We reverse and render.

Background

This lawsuit arises from a motor vehicle accident resulting in alleged injuries and damages to Davis and her two minor children. Davis alleges that she and her children were traveling on a Houston-area highway when traffic caused her to slow and stop her vehicle. Hung, a public safety officer driving a vehicle owned by the City of Houston ("City"), rear-ended Davis. Davis sued both Hung and the City, asserting in her original petition that Hung was negligent and that the City was vicariously liable because Hung was acting within the course and scope of his employment with the City when the accident occurred.

The City answered and moved to dismiss Hung from the lawsuit. In support of Hung's dismissal, the City argued that Davis's negligence claim was governed by the TTCA and subject to dismissal under Section 101.106 of the Act, also known as the election-of-remedies provision. *See* TEX. CIV. PRAC. & REM. CODE § 101.106. Section 101.106(e), the relevant subsection, provides that "[i]f suit is filed under this chapter against both a governmental unit and any of its employees, the employees

[1] Davis did not file an appellee's brief or any other response to Hung's issue on appeal in this Court.

shall immediately be dismissed on the filing of a motion by the governmental unit." *Id.* According to the City, this provision required that Davis's suit against the City, a governmental unit, and its employee, Hung, proceed against the City only.

The trial court initially granted the City's motion and dismissed Davis's negligence claim against Hung, leaving the City as the lone defendant in the lawsuit. Davis moved for reconsideration and reinstatement, complaining that she had not been given adequate time to oppose Hung's dismissal and that discovery should be permitted on the course and scope of Hung's employment before any ruling on the viability of her claim against him. The trial court reinstated Davis's claim against Hung and reset the City's motion to dismiss for a hearing.

After the trial court reinstated Davis's negligence claim against him, Hung filed his original answer and contemporaneously moved to dismiss under Texas Rule of Civil Procedure 91a. *See* TEX. R. CIV. P. 91a. In his Rule 91a motion, Hung argued that Davis's claim had no basis in law because the City's motion had triggered his right to dismissal under the election-of-remedies provision.

A little more than two weeks later, Davis nonsuited the City without prejudice and amended her pleading against Hung to omit the allegation that he was acting in the course and scope of his employment at the time of the accident and claim instead that he was off duty. Davis also responded to Hung's Rule 91a motion, urging that his dismissal request was mooted by her amended pleading. Davis urged that the

TTCA's election-of-remedies provision no longer applied because her amended allegation that Hung's negligence occurred while he was off duty placed her claim outside the TTCA's scope. She argued that the TTCA "does not apply to the wrongful act or omission or the negligence of an officer commissioned by the Department of Public Safety if the officer was not on active duty at the time the act, omission, or negligence occurred."

The trial court signed an order of nonsuit as to the City, and later denied Hung's Rule 91a motion. Hung filed a timely notice of appeal under Section 51.014(a)(5) of the Civil Practice and Remedies Code, which authorizes an interlocutory appeal of an order that "denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5).

Appellate Jurisdiction

Although neither party contends the trial court's interlocutory order denying Hung's Rule 91a motion is not appealable, we have a duty to examine our own jurisdiction. *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004). This Court generally does not have jurisdiction over an appeal from an interlocutory order denying a Rule 91a motion to dismiss. *See Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001) (noting party may not appeal interlocutory order unless

authorized by statute); *see also Koenig v. Blaylock*, 497 S.W.3d 595, 598 n.4 (Tex. App.—Austin 2016, pet. denied) (observing no statute permitted interlocutory appeal from an order denying Rule 91a motion); *S. Cent. Hous. Action v. Stewart*, No. 14-15-00088-CV, 2015 WL 1508699, at *1 (Tex. App.—Houston [14th Dist.] Mar. 31, 2015, no pet.) (mem. op.) (per curiam) (holding appellate court had no jurisdiction over interlocutory order denying Rule 91a motion to dismiss); *cf. In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding) (per curiam) (holding denial of Rule 91a motion to dismiss is subject to mandamus review). But an order denying a Rule 91a motion to dismiss may be the subject of an interlocutory appeal if its component rulings fall within the categories of appeals authorized by Section 51.014 of the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 51.014 (listing types of orders from which interlocutory appeal is available); *see also Bass v. Waller Cty. Sub-Reg'l Plan. Comm'n*, 514 S.W.3d 908, 912 & n.14 (Tex. App.—Austin 2017, no pet.) (noting "the Legislature has thus far not seen fit to authorize—at least categorically—appeals of interlocutory orders . . . denying Rule 91a motions" but that such orders "can conceivably include component rulings that have been made appealable").

Hung appealed the denial of his Rule 91a motion under Section 51.014(a)(5), which permits an interlocutory appeal of the denial of a "motion for summary judgment that is based on an assertion of immunity by an individual who is an officer

or employee of the state or a political subdivision of the state."[2] TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5). For the purposes of our appellate jurisdiction, it is not significant that Hung sought dismissal of Davis's claim against him by filing a motion to dismiss rather than a motion for summary judgment, as referenced in Section 51.014(a)(5). The Texas Supreme Court has recognized that "an appeal may be taken from orders denying an assertion of immunity, as provided in section 51.014(a)(5), regardless of the procedural vehicle used." *Austin State Hosp. v. Graham*, 347 S.W.3d 298, 301(Tex. 2011).

Here, the only basis for dismissal Hung asserted in his Rule 91a motion was the TTCA's election-of-remedies provision. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(e). By invoking the TTCA's election-of-remedies provision, Hung raised the issue of his immunity. *See Franka v. Velasquez*, 332 S.W.3d 367, 371 n.9 (Tex. 2011) (stating Section 101.106's election-of-remedies provision confers immunity

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[2] It was undisputed in the trial court both that Hung is an employee of the City and that the City is a political subdivision. The City attorneys have represented Hung throughout the case, and the City's separately filed motion to dismiss Davis's claim against Hung constituted a judicial admission that Hung was a City employee acting in the course and scope of his employment. *See Tex. Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 358 (Tex. 2013) ("By filing such a motion [to dismiss its employee under Section 101.106(e)], the governmental unit effectively confirms the employee was acting within the scope of employment and that the government, not the employee is the proper party."); *see also Ledesma v. City of Hous.*, 623 S.W.3d 840, 848 (Tex. App.—Houston [1st Dist.] 2020, pet. denied) ("[B]y moving to dismiss the claims against [its employee] under subsection (e), the City judicially admitted that [its employee] was acting in the scope of employment and agreed to vicariously defend her," thus barring the City "from later disputing that [its employee] was acting in the scope of her employment").

in some instances to employees of governmental units); *Fink v. Anderson*, 477 S.W.3d 460, 465 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (same). Thus, even though this appeal arises from a Rule 91a motion and not a summary judgment motion, we have appellate jurisdiction. *See Austin State Hosp.*, 347 S.W.3d at 301; *see also City of Webster v. Myers*, 360 S.W.3d 51, 55 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (concluding Section 51.014(a)(5) authorized appeal from denial of city's motion to dismiss under TTCA's election-of-remedies provision); *Univ. of Tex. Health Sci. Ctr. at Hous. v. Crowder*, 349 S.W.3d 640, 644 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (same); *accord Edinburg Hous. Auth. v. Ramirez*, No. 13-19-00269-CV, 2021 WL 727016, at *2 (Tex. App.—Corpus Christi Feb. 25, 202, no pet.) (mem. op.) (concluding Section 51.014(a)(5) authorized interlocutory appeal of denial of individual housing commissioner's Rule 91a motion to dismiss because motion challenged trial court's subject matter jurisdiction). We therefore consider the merits of the trial court's ruling.

Election of Remedies

In his sole issue on appeal, Hung argues that the trial court erred by denying his Rule 91a motion to dismiss Davis's negligence claim against him because, "by initially filing suit against both [the City] and [him], Davis irrevocably elected to pursue her claims against [the City] only and is forever barred from asserting her claims against [him] individually."

A. Standard of Review

Rule 91a provides a mechanism for early dismissal of a cause of action that has no basis in law or fact. TEX. R. CIV. P. 91a.1. We generally review the merits of a Rule 91a motion de novo. *See City of Dall. v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam); *Wooley v. Schaffer*, 447 S.W.3d 71, 75–76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). But the proper standard of review is not necessarily determined by the type of motion to which the order relates, rather it is determined by the substance of the issue to be reviewed. *Singleton v. Casteel*, 267 S.W.3d 547, 550 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (citing *In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000)).

Here, Hung's Rule 91a motion raised an issue of immunity as conferred by Section 101.106 of the TTCA. *See id.*; *see Franka*, 332 S.W.3d at 371 n.9. If immunity applies, the trial court lacks subject matter jurisdiction over Davis's negligence claim against Hung. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004); *see also Myers*, 360 S.W.3d at 56 (recognizing Section 101.106 is jurisdictional statute involving waiver of immunity); *Univ. of Tex. Health Sci. Ctr. at San Antonio v. Webber-Eells*, 327 S.W.3d 233, 240 (Tex. App.—San Antonio 2010, no pet.) (same). Subject matter jurisdiction is a question of law which we review de novo. *Miranda*, 133 S.W.3d at 226. Likewise, matters of statutory construction are reviewed under a de novo standard. *City of San Antonio v. City of*

Boerne, 111 S.W.3d 22, 25 (Tex. 2003); *see also Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

B. Governing Law

The state and certain governmental units are entitled to sovereign or governmental immunity, which deprives a trial court of subject matter jurisdiction, unless the state waives immunity by consenting to suit. *E.g.*, TEX. GOV'T CODE § 311.034; *Miranda*, 133 S.W.3d at 224; *see also Tex. Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 353 (Tex. 2013) ("[N]o state can be sued in her own courts without her consent, and then only in the manner indicated by that consent."). The TTCA "provides a limited waiver of immunity for certain suits against governmental entities and caps recoverable damages." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008); *see* TEX. CIV. PRAC. & REM. CODE §§ 101.001–.109. For instance, the Act generally waives governmental immunity to the extent that liability arises from:

> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
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> > (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

> (B) the employee would be personally liable to the claimant according to the Texas law[.]

TEX. CIV. PRAC. & REM. CODE § 101.021(1).

"After the [TTCA] was enacted, plaintiffs often sought to avoid the Act's damages cap or other strictures by suing governmental employees, since claims against them were not always subject to the Act." *Garcia*, 253 S.W.3d at 656. To prevent such circumvention and to protect governmental employees, the Legislature enacted a comprehensive election-of-remedies provision, Section 101.106, which "requires a plaintiff to decide on a theory of tort liability before suit is even filed." *Univ. of Tex. Health & Sci. Ctr. at Hous. v. Rios*, 542 S.W.3d 530, 536 (Tex. 2017); *see* TEX. CIV. PRAC. & REM. CODE § 101.106. The election-of-remedies provision requires a plaintiff to "decide at the outset whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable." *Garcia*, 253 S.W.3d at 657. "This early-election requirement 'reduce[s] the delay and expense associated with allowing plaintiffs to plead alternatively that the governmental unit is liable because its employee acted within the scope of his or her authority but, if not, that the employee acted independently and is individually liable." *Rios*, 542 S.W.3d at 536–37 (quoting *Garcia*, 253 S.W.3d at 657).

In this appeal, we are concerned primarily with the election-of-remedies provision's subsection (e):

> If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

TEX. CIV. PRAC. & REM. CODE § 101.106(e). In other words, when a plaintiff sues both a governmental unit and its employee in tort, subsection (e) requires the immediate dismissal of the employee upon the governmental unit's motion.[3] *See id.* "[T]his requirement effectively makes a plaintiff's apparent nonchoice an election to sue only the government." *Rios*, 542 S.W.3d at 537; *Tex. Dep't of Aging & Disability Servs. v. Cannon*, 453 S.W.3d 411, 417 (Tex. 2015) ("Cannon does not dispute that, by asserting common-law tort claims against both the Department and the Employees, she made an irrevocable election under subsection (e) to pursue those claims against the government only.").

C. Analysis

Hung argues that Section 101.106(e) bars Davis's claim against him because, in her original petition, Davis sued both the City, a governmental unit, and Hung, the governmental unit's employee, for negligence. We agree. By pleading in her original petition negligence claims against both the City and Hung that were premised on Hung's alleged actions in the course and scope of his employment with

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[3] The Texas Supreme Court has warned that "[b]ecause the decision regarding whom to sue has irrevocable consequences, a plaintiff must proceed cautiously before filing suit and carefully consider whether to seek relief from the governmental unit or the employee individually." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 657 (Tex. 2008).

the City, Davis made an irrevocable election to pursue a vicarious liability theory against the City. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(e); *Rios*, 542 S.W.3d at 538–39. The City's motion to dismiss Hung under Section 101.106(e) confirmed Hung's status as an employee and triggered his right to dismissal from the lawsuit. *See Rios*, 542 S.W.3d at 538–39; *Ngakoue*, 408 S.W.3d at 358 (filing of governmental unit's motion to dismiss under Section 101.106(e) effectively confirmed employee's status and actions within course and scope of employment).

Although she has not filed a brief on appeal, Davis sought to avoid Hung's dismissal in the trial court on the ground that Section 101.106, and particularly subsection (e), did not apply because she nonsuited the City and amended her petition to omit the allegation that Hung was acting in the course and scope of his employment at the time of the accident and to claim instead that he was off duty. In support of her argument, Davis relied on Section 101.065 of the TTCA, which provides that the Act "does not apply to . . . the negligence of an officer commissioned by the Department of Public Safety if the officer was not on active duty at the time the . . . negligence occurred." TEX. CIV. PRAC. & REM. CODE § 101.065. As its placement within the TTCA's subchapter containing "exclusions and exceptions" suggests, Section 101.065 is an exception to the TTCA's waiver of immunity for the negligence of off-duty law enforcement officers. *See id.*; *see also City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 (Tex. 2006) (noting

Subchapter C of TTCA—entitled "Exceptions and Exclusions"—lists circumstances in which Act's waiver provisions do not apply). Davis reasoned that, because of her amended allegations of off-duty negligence by Hung, her suit fell outside the scope of the TTCA and thus Section 101.106(e), which applies only to suits filed "under this chapter," was not implicated. *See* TEX. CIV. PRAC. & REM. CODE §§ 101.106(e), 101.065.

Davis's argument is inconsistent with decisions of the Texas Supreme Court. In *Garcia*, the Court rejected an interpretation of Section 101.106(e)'s "under this chapter" language that limited its reach to tort claims for which the TTCA waives immunity. *See* 253 S.W.3d at 658 ("[W]e have never interpreted 'under this chapter' to only encompass tort claims for which the [TTCA] waives immunity."). The Court reasoned: "Because the [TTCA] is the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be 'under [the TTCA]' for purposes of [S]ection 101.106." *Id.* at 659. The Court further reasoned that where tort claims are asserted against an employee and his governmental employer, and the TTCA does not waive immunity for the claims asserted, the employee would nevertheless be entitled to dismissal on the governmental unit's motion, even if the TTCA claims would not survive. *See id.*; *see also Myers*, 360 S.W.3d at 57 ("[I]f a plaintiff brings any state common law tort

claim against both a governmental unit and its employees, subsection 101.106(e) will allow the employee defendants to be dismissed on the motion of the governmental unit."). Considering *Garcia*'s reasoning, and without deciding whether Section 101.065 would have preserved the City's immunity in this case, we reject Davis's argument that Hung is not entitled to dismissal under Section 101.106(e) if there is no waiver of immunity under Section 101.065.

Davis's argument that her pleading amendment effectively mooted Hung's Rule 91a motion also does not avoid Hung's dismissal. On this point, we find the Texas Supreme Court's decision in *Rios* instructive. There, the plaintiff, a first-year medical resident, sued the University of Texas Health Science Center and several of its faculty doctors, alleging that they tried to discredit his reputation and harm his future career in medicine. *Rios*, 542 S.W.3d at 532. The plaintiff alleged contract claims against the Center and tort claims against the Center and the doctors. *Id.* The Attorney General answered for the defendants and moved to dismiss all but the tort claims against the Center. *Id.* As to the doctors, the Attorney General's motion argued for dismissal under Section 101.106(e). *Id.* at 532–33. The plaintiff responded by amending his petition to drop his tort claims against the Center, "leaving the [d]octors as the only tort defendants, and thus no longer suing under [the Act] . . . both a governmental unit and any of its employees." *Id.* at 533

(quotation omitted). The trial court denied dismissal of the tort claims against the doctors, and the court of appeals affirmed. *Id.*

On further appeal to the Texas Supreme Court, the trial court's order denying dismissal of the plaintiff's tort claims against the doctors was reversed. *Id.* at 539. The Court determined that the plaintiff's actions in amending his pleading did not deny the Center a ruling on its motion to dismiss under Section 101.106(e). *Id.* at 537–38. The Court determined that the filing of a motion to dismiss, not its content, triggers the right to dismissal under the statute. *Id.* at 538. And the statutory right to dismissal "is not impaired by later amendments to the pleadings or motion." *Id.* at 532. Thus, as to the plaintiff's claims:

> [The plaintiff] made an irrevocable election to pursue a vicarious-liability theory against the Center by alleging in his original petition state-law tort claims against both the Center and the [d]octors that were premised on the [d]octors[ ] being Center employees. [The] motion to dismiss the [d]octors under subsection (e) of the Act's election-of-remedies provision confirmed the [d]octors' status as employees and accrued their right to dismissal from the lawsuit. [The plaintiff] could not avoid this result by amending his petition to drop the tort claims against the Center[.]

Id. at 538–39; *cf. Austin State Hosp.*, 347 S.W.3d at 301 (holding TEX. R. CIV. P. 162 prevented plaintiff from circumventing doctor-defendants' right to dismissal under Section 101.106(e) by nonsuiting hospital after doctors moved to dismiss).

Applying the reasoning of *Rios* here, Hung's statutory right to dismissal under Section 101.106(e) accrued upon the filing of the City's motion to dismiss. *See Rios*,

542 S.W.3d at 538; *see also* TEX. CIV. PRAC. & REM. CODE § 101.106(e). This was an irrevocable consequence of Davis's election to sue both the City and Hung based on Hung's alleged negligence. *See Rios*, 542 S.W.3d at 536–37; *see also* TEX. CIV. PRAC. & REM. CODE § 101.106(e). This consequence could not be cured or remedied through Davis's nonsuit of the City or pleading amendment recasting her claim as one no longer under the TTCA or against both a governmental unit and its employee. *See Rios*, 542 S.W.3d at 537; *Austin State Hosp.*, 347 S.W.3d at 301. We therefore conclude the trial court could not have denied Hung's Rule 91a motion to dismiss on this or any other basis argued by Davis, and we hold the trial court erred by denying Hung's Rule 91a motion.

We sustain Hung's sole issue.

Conclusion

We reverse the trial court's order denying Hung's Rule 91a motion to dismiss and render judgment dismissing Hung from the lawsuit.

Amparo Guerra
Justice

Panel consists of Justices Hightower, Countiss, and Guerra.